(4)

No. 03-948

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHELLE SMITH

Petitioner,

v.

NORMA ALICE JONES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Does a direct conflict exist between the 11th Circuit Court of Appeals' arbitrary dismissal of a case as frivolous and the U.S. Supreme Court's holding in Barefoot v. Estelle, 459 U.S. 1169 (1983) when the issue before the 11th Circuit of whether section 1985 (3) of 42 U.S.C. § 1985(3) classifies as an equal civil rights statute for the purpose of removal has not been squarely foreclosed by authoritative court decision because the issue before the 11th Circuit was one of first impression?

2. Does a direct conflict exist between the 11th Circuit Court of Appeals' holding that an arbitrary dismissal of a removed civil rights case to federal court is frivolous for lack of evidence on appeal when the District Court failed to require or allow an evidentiary hearing, in conflict with State of Georgia v. Rachel, 384 U.S. 780, 792 (1966)?

3. Does a direct conflict exist between the 11th Circuit Court of Appeals and the Federal Rules of Civil Procedure when the 11th Circuit upheld the District Court's overturn of a default from a counterclaim in a removed action prior to remand?

RULE 29.6
STATEMENT AND INTERESTED PERSONS

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or non-wholly owned subsidiaries.

The following persons have an interest in the outcome of this litigation: Lovick P. Anthony, Jr., Attorney for the Mauk-Charing-Norwich Community Club; Edward Davis, Attorney for the Taylor County Board of Education; Norma Alice Jones, President, Mauk-Charing-Norwich Community Club; Judge Clay Land, District Court Judge, Middle District of Georgia; Gregory J. Leonard, District Court Clerk, Middle District of Georgia; Mauk-Charing-Norwich Community Club; W. Donald Morgan; Attorney for the Mauk-Charing Norwich Community Club; Gaynell Pittman, Treasurer, Mauk-Charing-Norwich Community Club; Michelle Smith, Petitioner; Taylor County Board of Education.

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REPLY TO BRIEF IN OPPOSITION

REASONS FOR GRANTING THE PETITION

Courts in Conflict Regarding Definition of a Frivolous Appeal

The respondents' brief states that the petitioners appeal was frivolous. However, that statement is conclusory. Respondents do not submit cases that provide clear guidelines in concluding that an appeal is frivolous. A frivolous appeal is defined as one that pursues legal points not arguable on the merits. Ozee v. American Council on Gift Annuities, Inc. 110 F.3d 1082, 1097 (5th Cir. 1997). Appeal based on colorable reading of case law is not frivolous. Edwards v. Cass County, 919 F.2d 273, 276 (5th Cir. 1990) Some courts admit that they cannot easily define that which is frivolous. "Frivolity, like obscenity, is often difficult to define." WSM, Inc. v. Tennessee Sales Co., 709 F.2d 1084, 1088 (6th Cir. 1983) A weak appeal is not a frivolous appeal. Hetreed v. Allstate Ins. Co. , 135 F.3d 1155, 1158 (7th Cir. 1998).

The Lower Court conclusively determined that the appeal was frivolous even though the appeal was based on a colorable reading of case law. Further, even the 7th Circuit determined that a weak appeal was not frivolous. Hetreed v. Allstate Ins. Co. , 135 F.3d 1155, 1158 (7th Cir. 1998).

The conflict regarding the definition of frivolous appeals is significant because it has far-reaching legal and practical effects. Many cases are without proper

redress. A Court of Appeals should have the authority to clear out its docket but not at the expense of dismissing claims without first ascertaining whether or not there are arguable legal merits not clearly foreclosed by case or statute. Further, many appeals are appeals of first impression, while many appeals call for the Court of Appeals to overturn its previous holding to create new case law.

Even the respondents in their brief in opposition acknowledge on page 3 of their brief that the case involves racial bias, which is an issue of first impression. Therefore, if the case is one of first impression, how can a case be arbitrarily dismissed as frivolous without some clear litmus test as to what is in fact frivolous?

Without clear guidelines regarding how a case is deemed frivolous, the dismissal of many worthy appeals as frivolous will proceed because these appeals have no final redress. A direct conflict exists between the 11th Circuit and Barefoot v. Estelle. The Supreme Court has stated that an issue is frivolous if it "squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case." Barefoot at 894.

The 11th Circuit has not specifically addressed whether 42 U.S.C. § 1985(3) qualifies as "an equal civil rights" statute. Alabama v. Conley, 245 F.3d 1292, 1296 (11th Cir. 2001). Because the 11th Circuit had not specifically addressed whether § 1985(3) qualifies as an equal civil rights statute, the issue in the present case was one of first impression. Since it was a case of first

impression, then the 11th Circuit's ruling as frivolous was in direct conflict with the Barefoot opinion.

Decision Not to Have an Evidentiary Hearing Incorrect

Respondents state that a hearing was held; they do not deny that an evidentiary hearing should have been held. Yet in fact, no evidentiary hearing was held. Oral arguments were held regarding the motions on the court docket: a motion for default judgment, a motion to overturn clerk's entry of default, and a motion for remand. No court reporter was present because the court did not order one to be present. If the court had intended for the oral argument to be an evidentiary hearing, then the court would have ordered a court reporter present. Petitioner did agree to proceed with oral arguments without a court reporter after Judge Lands informed the parties that they would have to reschedule the argument. At no time did the petitioner take the witness stand and at no time did the respondent cross examine the petitioner. The oath that the respondent refers to is the oath that every lawyer takes when sworn in to practice law, not an oath sworn to in this case. At no time, did an oath take place in this case.

Without an evidentiary hearing, the District Court could not properly determine whether there was sufficient evidence to sustain or deny removal. The court called the petitioner's attention to the Rules of Evidence. But per the persuasive precedent of the 7th Circuit in Borowski v. DePuy, Inc., 850 F.2d 297, 306 (7th Cir. 1988), the petitioner cannot supplement the

record with documents that were not part of the district court record.

Petitioner/Defendant/Smith (Smith) asked the District Court for permission to present evidence of the Club Members committing arson to the defendant's home place at the oral argument on November 12, 2002, but Smith's request to present the evidence from the certified arson investigator was denied both as to presenting the evidence in open court or in chambers. There is no record of this conversation from the case record because no court reporter was present at the oral argument. The court did ask Smith if the incidents and the evidence she had obtained through a private arson investigator and forensic document examiner had been turned over to the appropriate authorities. Smith replied that the evidence had been turned over to the Federal Bureau of Investigations as well as the United States Attorney's Office.

A direct conflict exists with the 11th Circuit Court of Appeals and State of Georgia v. Rachel, 384 U.S. 780, 792 (1966) because Rachel requires a hearing to establish the evidence sufficient to sustain removal. The District Court did not hold an evidentiary hearing and the 11th Circuit in direct conflict with Rachel dismissed this argument.

Smith did not present the information of the conversation between Smith and the District Court Judge from the November 12, 2002 hearing to the 11th Circuit Court of Appeals because this information had never appeared in the record previously, and to do so would have been frivolous. The defendant at all times

was deferential and conscientious in her respect to the court by not submitting information to the court that had not previously been incorporated into the District Court Record either by sworn statements of affidavits or court transcript.

The decision to not have an evidentiary hearing is incorrect. This particular case squarely presents the inherent conflict of not having an evidentiary hearing before making a ruling regarding a remand from a civil rights removal. Respondents state that this case was not worthy of removal, but this case is exactly the type of case that warrants removal. The respondents attach copies of the latest Superior Court Case that proceeded contemporaneously with this appeal due to the case's remand back to Taylor County Superior Court. These orders were not part of the District Court record and as such should not be considered as any type of evidence.

However, since the respondents have opened the door regarding the presentment of the Superior Court Proceedings, the petitioner submits that what happened at the Taylor County Superior Court Proceedings are exactly why the case should have been removed to Federal Court. During the proceeding, Smith was not allowed to argue any points regarding the arson of her 100 year old historic family home place. Smith was not able to present this information because the Judge prohibited it, but because Smith and Smith's supporters were threatened at the oral argument in Taylor County Superior Court in Butler, Georgia.

The threat was so severe that the Sheriff and two deputies escorted Smith out of the court room and out of the county after the ruling. Smith's life was threatened, and those of her black supporters. Smith was forced to not detail the name of the arsonist in open court because if she did so, she would be "popped as soon as she leaves the courthouse." The threat was clear --- if you present your case in a certain way, then you and your black supporters will be killed. The threat was so credible that the Sheriff allowed a private civilian to enter the courtroom with a gun to assist in protecting Smith with the Sheriff's armed officers.

The country is still polarized by racial bias and racial divide. The present case shows how polarized one community is in regards to race. Taylor County may be a novelty with its dual black and white proms, but it is hardly a novelty with racial prejudice. Racial prejudice exists throughout the country and many times the only way even handed justice comes is by a defendant removing a case to federal court pursuant to his or her civil rights.

This Court should clarify by a bright line ruling whether or not Rachel in fact requires an evidentiary hearing prior to a court making a determination to remand. Without a definitive ruling, many removed cases based on civil rights will be remanded back without a hearing to properly determine whether or not the cases established an adequate evidentiary burden to stay in federal court under the civil rights statute.

A Motion to Remand Does Not Toll the Answer of a Counterclaim

A direct conflict exists between the 11th Circuit Court of Appeals and the Federal Rules of Civil Procedure when the 11th Circuit upheld the District Court's overturn of a default from a counterclaim in a removed action prior to remand. The Federal Rules of Civil Procedure do not toll the answer of a counterclaim when filing a motion to remand. Default by reckless disregard for judicial proceedings should preclude the finding of relief from the default, and further warrants a default judgment.

In the present case, the entry of default and default judgment are warranted because the club disregarded FRCP 12 by failing to file an answer to the counterclaim, and otherwise exhibited a calculated, callous, willful, reckless, deliberate disregard for the judicial process. The 11th Circuit Court of Appeals has noted that if a party willfully defaults by displaying either an intentional or reckless disregard for the judicial proceedings, the court need make no other findings in denying relief. Compania Interamericana v. Compania Dominicana, 88 F.3d at 951-952 (11th Cir. 1996) At the time of the default, removal was proper.

The Federal Rules of Civil Procedure do not toll the answer of a counterclaim when filing a motion to remand. If a Court of Appeals can supercede the Rules of Civil Procedure, then there is no continuity and stability for all judicial proceedings. A counterclaim cannot establish jurisdiction in federal court. But until

jurisdiction is found to be incorrect by the court by an order of remand, then jurisdiction is proper and an answer is required.

When an answer is not filed and default is entered, the default should stand irregardless of whether or not the case is remanded back to another jurisdiction. At the time of the default, jurisdiction is proper. To rule or hold otherwise under scores the necessity for strict rules within the judicial process.

This Court should affirmatively state that a motion for remand does not toll the Federal Rules of Civil Procedure in answering a counterclaim. This Court does have jurisdiction to affirmatively state whether or not a motion to remand tolls the answering of a counterclaim.

CONCLUSION

Smith is a new attorney who has risked her life to fight for the rights of minorities and the rural poor. She has been discriminated against and permanently prejudiced in the Georgia Superior Court because of her work with civil rights and black clients. Smith has lost her historic 100 year old family home place by arson. The leading arson investigator in the Southeast determined the arsonist to be a member of respondents' organization. A rattlesnake was placed in Smith's office. Smith was unable to present her case in a certain way, to her prejudice, because of overt threats of violence based on racial bias and prejudice.

No, contrary to the respondents assertion, this case is not merely about the ownership of a building. This case, and others similar to it, is about much more. The petition raises issues of law that warrant review by this Honorable Court. The petition for a writ of certiorari should be granted.

Respectfully Submitted.

/s/ Michelle Smith

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